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THE FIXED LAW OF PATENTS. By WILLIAM MACOMBER. Second Edition. Boston: LITTLE, BROWN & Co. 1913. pp. clxix, 1044.

The work is not a treatise or text book, nor is it a digest. It is a condensed case book on the law of patents, but only in so far as that law has been pronounced by the Supreme Court of the United States and the nine Circuit Courts of Appeals. We are told in the preface that the labor grew out of the necessities of the author's practice, and that the book is written to put between the thumb and finger of the busy general practitioner answers to the questions of patent law that arise from day to day in general practice. We are told also in the preface that "the entire work is founded on the principle that a patent is a monopoly created in contravention of the common law, and that every decision must, therefore, root back in a statute," and that "every main proposition is accordingly worked out from the statute." Circuit Court decisions are excluded because of their supposed lack of finality and also presumably because of their great bulk. The author frankly admits that this "renders the work incomplete, in a sense," but he believes that it places the work "without the pale of flux and gives it the character of a code, rather than the detail of a digest." No study of the patent law is, of course, complete on the historical side that omits the constructive decisions at circuit of the early days and no study of the patent law is complete on the practical administrative side that omits the decisions of the lower courts of to-day. But the author's work is to be judged by the way in which he presents that portion of the field of patent law that he selects for presentation, and he has undoubtedly selected the more authoritative part.

The author says that no appellate decision stating "any principle or rule" is intentionally omitted. The method of statement is to employ the exact language of the decision, followed by a recital of the authorities upon which it is based. The condensation consists almost entirely in mere omission (and the vast bulk of all decisions is omitted). The arrangement is under titles and section headings, as in a digest. And under each section heading the arrangement of cases is generally chronological, and successive section headings not infrequently (and quite usefully) illustrate contrasted opposite rules relating to the same subject. Here and there a case is followed by a brief note of criticism, commendation, or suggestion, always printed, however, in such form as to be readily distinguishable from the case itself. An analysis of the patent statutes is made under identical titles. There is a table of cases excerpted with names of judges, citation of case below and, in many instances, of other cases on the same patent. There is also a "Brief Survey" of the law arranged under the same alphabetical headings, "written in the freedom of personal expression." A table of cases cited and a general index complete the work.

Within the scope of the work the selection of cases seems to be wise and fairly exhaustive.

The condensation of individual cases by omission merely and by omission of the great bulk of all of them, including all discussions as to particular patents, their validity and scope, and as to particular infringements, leaving the cases to stand only as pronouncements of general principles and rules, seems to the writer, after a considerable examination and use of the book, to have been carried out not only with infinite patience, but with great skill, and to have been carried to a wise extreme, so that a single volume in good type and not too

bulky for convenient handling covers the whole field. And rigid adherence to the language of the court itself renders each excerpt authoritative. No reliance whatever has been placed upon syllabus of court or reporter (on which digests are ordinarily based) and the excerpts therefore have special authority. One will turn of course to the original cases themselves for exhaustive study and one must so turn for any study of the application of the principles and rules to the facts of particular cases. But the book is merely a guide to, and help in, such study, and a brief survey of principles and rules as laid down in the cases themselves. As such, it is entirely novel in aim and method, and is unique in its compactness, authority, and completeness, and for these reasons it is invaluable not merely to the general practitioner, but even more so to the practising patent lawyer. We notice little unnecessary repetition (that on pages 783 to 787 repeating pages 548 to 551 being, however, a glaring instance) and no prolixity.

The titles and section headings are for the most part excellent and in many instances quite original, and with the numerous cross-references enable one quite reliably and quickly to find the authorities he seeks. The path, however, is not always direct. For example, the familiar digest heading "Two years' public use and sale before application" is not found either in the body of the work or in the general index. The cases on that subject are found partly under the heading "Public Use" §§ 849 to 858 inclusive (where cases relating to "prior public use by others before the patentee's invention," which constitutes anticipation, are intermingled with cases relating to two years' public use or sale before application, which constitutes a bar), and partly under the heading "Defenses:" "§ 321. Statutory—Prior Public Use or Sale." Another example is the familiar problem of the "pioneer" invention. That heading does not occur. The cases are found partly under "Claims:" "§ 197. Construction—Generic" and "§ 241. Generic;" partly under "Infringement:" "§ 497. Generic Patent;" and partly under "Invention:" "§ 640. Generic—Construction" to "§ 644. Generic—What is." It would seem that the general index might with profit be considerably amplified.

The table of cases excerpted gives the names of court and judge. That is always useful and is sometimes important, but the year of decision should also be given; and to give these same details also in the body of the work would be an added convenience, especially the circuit and the year.

The "Brief Survey" (pp. 1 to 76) is in no sense a treatise on patent law, but, under alphabetical headings, paralleling those of the cases themselves, it picks out the high lights of the cases with interesting and suggestive comment and full references and cross-references and with the wit of extreme brevity.

Here and in short notes among the cases our author occasionally criticises or commends particular decisions, but always with a frank sincerity and insight that challenges attention whether one agrees or not, and that cannot but be helpful to bench and bar alike.

The Supreme Court does not escape criticism. Of one particular decision (*Westinghouse vs. Boyden*, 170 U. S. 537, holding that Boyden had not infringed the Westinghouse patent although Westinghouse had made a pioneer invention) he says (p. 25) that he "agrees with the four dissenting Supreme Court Justices and many of our ablest lawyers in regarding it as contrary to the spirit and trend of other

decisions, as depriving great genius of its just reward, and as putting a premium upon * * * thievery * * *” (see also pp. 48, 65, and 638-640); and in another place he says (p. 53): “the writer is under the profound conviction that the rule of that case marks a halt in the progress hitherto due to the protection of basic invention;” and in the later decision in the Expanded Metal case (p. 1011), 214 U. S. 366, he saw “the entering wedge for the reversal of the bad law” of the Westinghouse case.

“The much discussed Mimeograph case (*Henry vs. Dick*, 224 U. S. 1) our author characterizes as “a perfectly logical case-law decision” (p. 29) and as undoubtedly “enforced by prior decisions both American and English,” (p. 1023), but to him it “seems a contravention of substantive law” (p. 37) and on moral and economic grounds he gives it but grudging assent (p. 1023) and thinks it probable that “the immunities granted a patentee by this and the Harrow case (*Bement vs. National*, 186 U. S. 70) will be circumscribed either by statutory enactment or by change of judicial view” (p. 59). It is impossible, however, on any rule of reason, to reconcile the dissenting opinion in the Mimeograph case with the fundamental character of patent property as immemorially defined in the statutes and in the authorities, and it is equally difficult to see how reason could come at any time to any other conclusion than that reached by the majority of the court.

Our author finds great satisfaction, too, in the decision in *Westinghouse vs. Wagner*, 225 U. S. 604, putting “on sound foundations,” in his opinion (p. 1014, 66), “the rules of segregation and trustee *ex maleficio*” on accountings, where segregation is rendered impossible by the conduct of the defendant—this “after more than a quarter of a century of misconstruction of the statute and academic refinement and sophistry centering about the old Mop Case” (*Garretson vs. Clark*, 111 U. S. 121). But the rule of *Westinghouse vs. Wagner* that the burden of proof of segregation shifts from the plaintiff to the defendant where such segregation is rendered impossible by the act of the defendant, is logical and just only in case such act of the defendant was such act of deliberate and intentional confusion. If it has any wider application it would seem to be unfounded in reason or in other authority and to be fraught with danger for the future.

Another dangerous tendency in some of our Circuit Courts of Appeals which the author has not picked out for criticism is illustrated in *Benbow-Brammer vs. Straus*, 166 Fed. 114, 170 Fed. 965, namely the tendency, under impulse of large commercial use and under guise of the doctrine of equivalents, to disregard limitations expressly and deliberately laid in the claim—in other words the tendency to revert in effect to the earlier English rule and to make over the patent by judicial construction into a patent for what the court finds the inventor actually did, and regardless, in effect, of what the inventor himself thought he did, as evidenced by his claims, and of what the examiner thought the inventor entitled to, as evidenced also by the claims. This tendency, if carried to its logical limit, would leave the government grant in effect without definition of its metes and bounds, and would leave the public without notice as to such metes and bounds, and would change the patent law in its practical applications, to the arts and industries from the substantially exact science that it usually has been to little more than guess-work.

The selection of title ("The *Fixed Law of Patents*") suggests the question how any body of law can be called "fixed" which is authoritatively pronounced by nine coördinate and independent appellate courts. Patents are nation-wide in their nature and application. The Circuit Courts of Appeals are territorially limited in their jurisdiction; and yet as between parties properly before them their findings are conclusive wherever throughout the nation those parties go. That a given patent may in the eyes of the law mean one thing in one circuit and another thing in another circuit,—may mean one thing as between the patentee and A and another thing as between the patentee and B,—may perchance be valid in the one case and invalid, that is to say, no patent at all, in the other case,—would seem impossible, if it were not the fact. Our author is alive to this situation, saying (p. 93) in criticising *Kessler vs. Eldred*, 206 U. S. 285:

"It is believed that nothing short of Congressional action amending the Circuit Court of Appeals Act, can give relief from the utter chaos which now exists."

If the suggestion were made for change of title to "The *Mixed Law of Patents*" in place of "The *Fixed Law of Patents*," it would be only to startle attention to this strange and anomalous situation (which the Supreme Court does not relieve) and to help concentrate effort on Congress to give relief, for example, by passing the most excellent bill of the American Bar Association for a national Court of Patent Appeals, a bill which that Association has advocated for the last ten years.

Mr. Macomber's book is well arranged and well printed, and it has already become necessary to the profession, and is, within the limits of its scope, invaluable to the student of patent law. It is the most important contribution that has been made in years to the systematic presentation of the actual working rules and principles of the patent law as pronounced in appellate cases, whether those rules and principles be regarded as in flux or in code, as fixed or mixed.

Wm. Houston Kenyon.

CORPORATION FORMS AND PRECEDENTS. By WILLIAM MEADE FLETCHER. Chicago: CALLAGHAN & Co. 1913. pp. xli, 2122.

The author offers his work to lawyers and to persons interested in corporations "as a complete collection of practical corporation forms and precedents." He has succeeded admirably. The collection of forms is both exhaustive and accurate. It is supplemented by frequent foot-notes referring to judicial decisions where the courts have passed upon or construed the forms. The chapters on "Voting Trusts," "Merger and Consolidation," and "Reorganization" are especially valuable. But the author does not content himself with simply presenting the stock forms used in all the states. He also has collected, with commendable industry, sets of forms for each of the different states. The reviewer carefully examined the forms submitted for Illinois, New Jersey, and New York, and found them not only reliable but accompanied by most serviceable lists of recent cases.

The index is a most important feature in a work of this kind. It is not too much to say that the index to this collection is sufficiently minute to satisfy any ordinary need. It is, moreover, exhaustive in its cross-references.